No. 06-699

FILED
JAN 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DAISY ESTELLE COBB,
widow of OLIVER RAY GIBBS,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Trustees and Administrators of the Central States Pension Fund are fiduciaries. [Exhibit 3, in Doc #17, Part 2, Folder 2 of 2, CS 0477] 29 U.S.C. § 1104(a)(1)(A)(i)(ii)(B) and (D) provides in pertinent part

> that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the purpose of providing benefits to participants and their beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter 3 of this chapter.

Mr. Gibbs was a participant in the Central States, Southeast and Southwest Areas Pension Plan. He was married to the petitioner, Daisy Estelle Cobb Gibbs. He was over the age of 55. He had more than twenty years of service. Upon his retirement he was eligible for a JSO.

It was the duty of the Trustees as the administrators of the plan to see that the terms of the plan were complied with. 29 U.S.C. § 1104(a)(1)(A)(i)(ii)(B) and (D). ERISA imposes a fiduciary duty on plan administrators to discharge their duties in accordance with the documents and instruments governing the plan. *See McGown v. NJR Service Corporation*, 423 F.3d 241, 245 (3d Cir. 2005). When Mrs. Daisy Estelle Cobb Gibbs administratively appealed to the Board of Trustees of Central States the

Trustees determined that, "The communications, acts and omissions by the late Oliver Ray Gibbs, at and around the time of his 1978 (sic) retirement, induced the Pension Fund to rely, and the Pension Fund did, in fact, actually and reasonably rely upon his intention to reject the JSO." (RE 27; RE 11-12, ¶ 39 [R.168-69, ¶ 39].) However, footnote 2 on page 3 of Respondent's Brief in Opposition to Petition For Writ of Certiorari states, "It is unclear why Mr. Gibbs misrepresented that his spouse was deceased." The attorneys for Central States seem to be contradicting the Trustees. However, it was not the duty of the Trustees to rely on Mr. Gibbs' intention. Nor was it the duty of the Trustees to rely on their interpretation of his intention. Rather, it was the duty of the Trustees to administer the Plan in accordance with the terms of the documents and instruments governing the Plan. The fiduciaries were required to discharge their

> duties with respect to the plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims in accordance with the documents and instruments governing the plan.

29 U.S.C. § 1104(a)(1)(A)(i)(ii)(B) and (D). The Trustees totally failed their duties in this regard. The terms of the Plan clearly provided that a retiree would be required to provide proof of his marital status. [SPD Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0467] The Trustees failed to require such

proof. Since Mr. Gibbs was a participant eligible for a JSO, the terms of the Plan required that the administrators of the Plan provide him with an election form requiring that he reject the JSO and stipulating that if he failed to reject the JSO his benefit would be awarded as a JSO according to the terms of the Plan. This election form was required to be provided to Mr. Gibbs within a 90 day window upon his application for a retirement pension benefit. (Petitioner's Petitioner For Writ Of Certiorari, pages 13-14) [SPD Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0467] The administrators of the Plan failed to provide this form to Mr. Gibbs. Mr. Gibbs failed to reject the JSO. In fact, Mr. Gibbs failed to make an election of any kind. The Fifth Circuit held that Mr. Gibbs never made any election at all. Central States unilaterally awarded Mr. Gibbs a lifetime benefit. However, according to the terms of the Plan, since Mr. Gibbs was eligible for a JSO, he had to first reject the JSO before he could become eligible for a lifetime benefit. Since Mr. Gibbs failed to reject the JSO, within this window of opportunity, under the terms of the Plan Mr. Gibbs' pension benefit was required by the Plan to be awarded as a JSO.

Whether the Trust Agreement, as it read in 1979, when Mr. Gibbs retired, gave the administrators or fiduciaries discretionary authority to determine eligibility for benefits or to construe the terms of the plan was never shown in this case. The Trust Agreement, as it read, with all of its amendments up through the date of the hearing on the Motion For Summary Judgment, in the United States District Court for the Eastern District of Louisiana, was made part of the record. However, exactly how the Trust Agreement read in 1979 and whether the said Trust

Agreement gave the administrators and fiduciaries discretionary authority to determine eligibility of benefits or to construe the terms of the plan was never established. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989) was a landmark case that established the standard of review in ERISA cases. Prior to *Firestone*, many benefit plans did not give the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan.

The Fifth Circuit concluded that Mr. Gibbs rendered himself ineligible for the JSO by misrepresenting that his spouse was deceased. However, no participant who was eligible for a JSO as Mr. Gibbs was, could render himself ineligible for a JSO by misrepresenting that his spouse was deceased when, in fact, she was alive, and, when, in fact, he was eligible for a JSO. It was the duty of the Trustees to rule on whether a participant was eligible or was not eligible for a JSO. The Trustees had to determine eligibility for a JSO based upon objective criteria set forth in the Plan. These criteria were: 1) was the participant married; 2) was he 55 years of age or older; 3) did he have 20 years of service. Mr. Gibbs met all of these criteria. Therefore, he was eligible for a JSO.

The Fifth Circuit also determined that Mr. Gibbs made a de facto election of a lifetime benefit and that the de facto election was not voidable even if Mr. Gibbs misrepresented that his wife was deceased. The court stated that because Mr. Gibbs retired in 1978 (sic) he was entitled to select the lifetime benefit without the consent of his spouse because before 1984 the spouse of a participant was not required to join in a JSO election. It is true that Mr. Gibbs could elect the lifetime benefit without the consent of his spouse. However, his misrepresentation did not release him from the requirements of the Plan. Mr. Gibbs

had to comply with the terms of the Plan. The terms of the Plan required that Mr. Gibbs first reject the JSO before he could become eligible for a lifetime benefit. And, the terms of the Plan clearly provided that if Mr. Gibbs did not reject the JSO, within the 90 day window of opportunity, then, according to the terms of the Plan his benefit would be awarded as a JSO. Committing misrepresentation did not release Mr. Gibbs, or Central States, from being required to comply with the terms of the Plan.

The Fifth Circuit held that Mrs. Gibbs did not have standing to sue as a beneficiary under 29 U.S.C. § 1132(a) and held that the District Court lacked subject matter jurisdiction and, accordingly, the judgment was VACATED and this matter was REMANDED with instructions to dismiss the complaint for want of jurisdiction. The Fifth Circuit held that Mrs. Gibbs did not have standing to sue as a beneficiary under 29 U.S.C. § 1132(a) because she was never designated by Mr. Gibbs or by the terms of the Plan as being entitled to a JSO benefit.

The Fifth Circuit held "Gibbs never personally 'designated [Cobb] or anyone else as a beneficiary of his Plan assets.'" Pet. App. 7. It is true, as the Fifth Circuit found, that Mr. Gibbs never designated Mrs. Gibbs as the beneficiary of his plan assets. However, under the terms of the Plan, as shown above, Mrs. Gibbs was to be awarded a JSO in the absence of a valid election by Mr. Gibbs rejecting the JSO. As shown above, he was married, he was age 55 or older, he had more than 20 years of service and therefore was eligible for a JSO. And, under the terms of the Plan, before he could become eligible for a lifetime benefit, he was required first to reject the JSO on an election form to be provided to him by Central States, within a 90 day window. He was never provided with an election form and he never rejected the JSO. Therefore he

was not eligible for a lifetime benefit. And, under the terms of the Plan, his benefit was required to be provided to his surviving spouse in the form of a JSO.

The Fifth Circuit further held, "[T]herefore, [Cobb's] assertion of beneficiary status rests upon the language and terms contained in the Plan." Pet. App. 7. The Fifth Circuit then quotes the Plan section on Pre-Retirement Benefit and Post-Retirement to Spouse and concludes that if a plan participant dies after retirement, the spouse is eligible for a "post-retirement" benefit only if the Pensioner was receiving "this" pension benefit, that is, the reduced joint and survivor benefit, not the Lifetime benefit. The Fifth Circuit concludes that Cobb (Mrs. Gibbs) is not "entitled" to any benefit under it because she does not satisfy one of the eligibility criteria for it: "Gibbs was not receiving "this" benefit (i.e. the joint and survivor benefit); he was receiving the lifetime-only benefit." However, when the Fifth Circuit quotes the plan's section on "Pre-Retirement and Post-Retirement Benefit to Spouse" the Fifth Circuit ignores the language that provides "subject to the election and rejection provisions in "Appendix A" of this Plan." (*See* Excerpt VII, Page 36, [Plan, Appendix A(3) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0513].)

Mr. Gibbs met all the criteria for eligibility of a JSO under the terms of the Plan. The Plan required that he be provided with an election form and that he be required to reject the JSO. He could then elect the lifetime benefit. He did not reject the JSO and he did not elect the lifetime benefit. Therefore, according to the terms of the Plan if he did not elect to reject the JSO, the Plan required that his benefit be paid as a Joint And Survivor Pension Benefit.

APPENDIX A PROCEDURES FOR ELECTION AND REJECTION, BEFORE AND AT RETIREMENT, OF THE JOINT AND SURVIVOR PENSION BENEFIT (PRE-RETIREMENT AND POST-RETIREMENT BENEFIT TO SPOUSE)

(3) POST-RETIREMENT OPTION. . . . If the Participant does not elect in writing (at some time within said 'post retirement election period') that such benefit shall not be payable upon his subsequent death, the Joint and Survivor Pension Benefit shall be payable with respect to all pension benefit payments.

The Summary Plan Description provides on Section 6 (b)(ii) on pages 16-17 (*See* Excerpt VII, Page 27, [SPD Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0467]) as follows:

SECTION 6 HOW YOUR PENSION WILL BE PAID

(b) Joint and Survivor Pension Benefit

(ii) After Retirement Joint and Survivor Pension Benefit

IMPORTANT: If you do not take this election, the federal pension law requires that your benefit be paid as a Joint and Survivor Pension Benefit. If you want your benefit paid as a lifetime only pension, you MUST elect in writing that you reject the Joint and Survivor Pension Benefit.

PLEASE NOTE: You will be required to submit documents verifying your marital status and the identity of your spouse. The surviving spouse benefit may be paid only to the spouse identified by these documents. If you are not survived by

> that spouse, no death benefit shall be paid by this Plan.

The Fifth Circuit by finding that the fraud of the participant was a *de facto* election of the lifetime benefit that was not voidable, even though the participant misrepresented that his wife was deceased, in effect ignores the terms of the documents and instruments governing the plan and holds the Trustees, who were the fiduciaries of the Plan, free and harmless from the requirement of administering the Plan in accordance with the terms of the documents and instruments governing the Plan.

REASONS FOR GRANTING THE PETITION

A.

By granting the petition for certiorari this court can resolve the split amount the various circuits, particularly the Fifth and the Seventh Circuits, as to whether the surviving spouse of a participant, in a retirement pension plan governed by ERISA, who would normally have standing, but for the disputed alleged de facto election by the participant, continues to have standing to challenge the alleged de facto election of the participant, as a potential beneficiary within the meaning of 29 U.S.C. § 1102(8).

B.

By granting the petition for certiorari this court can require the Fifth Circuit to review de novo the entire record from the United States District Court for the Eastern District of Louisiana.

C.

By granting the petition for writ of certiorari this court can review the decision of the Fifth Circuit below. The Fifth Circuit held that *Coleman v. Champion Int'l Corp.*, 992 F.2d 530 (5th Cir. 1993) was a precedent and under this precedent Mrs. Gibbs is not a beneficiary. Thus Mrs. Gibbs does not have standing to sue and the complaint must be dismissed for want of jurisdiction. In *Coleman*, a son of a pension plan participant sought to be recognized as a beneficiary of the plan with standing to sue under ERISA. The court held in *Coleman* that the son was not a beneficiary of the Plan with standing to sue under ERISA because (1) the son was not designated to receive benefits under the Plan and (2) the terms of the Plan, which directed the Trustees to designate a beneficiary from the group of the decedent's spouse, descendants, heirs at law, and representatives of the estate, if there were any benefits "payable," could not designate a beneficiary because there were no benefits payable. (The participant received benefits under the "Lifetime Only" option, as here.) However, *Coleman* is distinguishable from the present case because in *Coleman* the petitioner was a son rather than a surviving spouse and the participant, Charlie Coleman, made a valid election to remain under the normal Lifetime Only Income payment option. In the present case, Mr. Gibbs made no election. He committed misrepresentation and the court called this a de facto election of a lifetime benefit. Furthermore, if the terms of the Plan are complied with, Mrs. Gibbs must be awarded a JSO because according to the terms of the Plan, Mr. Gibbs made no election, and he was eligible for a JSO. And, since Mr. Gibbs failed to reject the JSO under the default provisions of the Plan, his benefit must be awarded as a JSO. In *Sladek v. Bell System Management Pension Plan*, 880 F.2d 972, 976-78 (7th Cir. 1989), the court held that

"although the appellant was clearly not designated as a beneficiary by her husband, she was a beneficiary under the Plan in the absence of a valid election." That is exactly the situation in this case. Mrs. Gibbs was the beneficiary of a JSO in the absence of a valid election rejecting the JSO. As stated in *Sladek*, ERISA was not designed to protect those beneficiaries already receiving benefits, but also "putative" beneficiaries. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 933 (7th Cir. 1989).

CONCLUSION

This court should grant a writ of certiorari and should find that the Fifth Circuit failed its duty to review de novo the entire record from the United States District Court for the Eastern District of Louisiana; further, the Fifth Circuit committed error in vacating the judgment of the United States District Court for the Eastern District of Louisiana and remanding with instruction to dismiss for want of subject matter jurisdiction; further, this court should resolve the split among the circuits as to whether the surviving spouse of a participant, in a retirement plan governed by ERISA, who would normally have standing, but for the disputed alleged de facto election by the participant, continues to have standing, to challenge the alleged de facto election of the participant, as a potential beneficiary within the meaning of 29 U.S.C. § 1002(8).

Respectfully submitted,

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